

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

GRAND TERM 1916

No. 225

THE UNITED STATES PLAINTIFF IN ERROR

JAMES T. McNEIL

IN ERROR TO THE SUPREME COURT OF THE UNITED STATES
FROM THE SUPREME COURT OF CALIFORNIA

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 685.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

JESSE T. MOREHEAD.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF MONTANA.

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THE END OF THE WORLD

1 *Names and addresses of attorneys of record.*

Hon. Thos. W. Gregory, Attorney General, of Washington, D. C.;
Hon. B. K. Wheeler, U. S. attorney, of Butte, Montana, attorneys
for plaintiff in error.

Hon. W. B. Sands, of Chinook, Montana, attorney for defendant
in error.

2 In the District Court of the United States in and for the
District of Montana.

THE UNITED STATES OF AMERICA, PLAINTIFF,	}	No. 2849.
<i>vs.</i>		
JESSE T. MOREHEAD, DEFENDANT.		

Be it remembered that on 30th day of June, 1916, an indictment
was duly presented and filed herein, in the words and figures fol-
lowing, to wit:

3 UNITED STATES OF AMERICA,
District of Montana, ss:

In the District Court of the United States within and for the
District of Montana, of the April term of said District Court, held
at Helena, Lewis and Clark County, in said district of Montana, in
the year of our Lord one thousand nine hundred and sixteen.

The grand jurors of the United States of America, duly impaneled,
sworn, and charged to inquire within and for the district of Mon-
tana, and true presentment make of all crimes and misdemeanors
committed against the laws of the United States, within the State
and district of Montana, upon their oaths and affirmations do find,
charge, and present:

That on January 6, 1914, in the State and district of Montana,
and within the jurisdiction of this court, one Jesse T. Morehead,
late of the State and district of Montana, named as defendant
herein, unlawfully and feloniously did conspire, combine, confeder-
ate, and agree with one Merrill D. Herrington, and with divers
other persons whose names are to the grand jurors unknown, to
knowingly, wilfully, wrongfully, unlawfully, and feloniously cause,
induce, and procure, to wit, Charles H. Vosburgh, Charles L. Bent-
ley, and a large number of other persons whose names are to the
grand jurors unknown, who had theretofore served as officers or
soldiers in the Army of the United States of America in the War
of the Rebellion, or were widows of such officers or soldiers, and
who, by reason of such service, were entitled to file by agent home-
stead declaratory statements and applications to enter public lands
of the United States subject to entry under the homestead laws of
the United States, to make and file homestead declaratory state-
ments and affidavits and applications to enter under the homestead

laws of the United States certain tracts of public land of the United States of America situated in the State of Montana, which
4 said lands were then or would thereafter become subject to entry under said homestead laws, and to cause, induce, and procure said persons making and filing such homestead declaratory statements, applications, and affidavits to enter said lands situated in said district of Montana, to commit perjury in the making and filing of the aforesaid homestead declaratory statements, applications, and affidavits; said unlawful and felonious conspiracy, combination, confederation, and agreement being one for causing, inducing, and procuring said persons to commit perjury by the means and in the manner now described, that is to say:

The said defendant, Jesse T. Morehead, and the said Merrill D. Herrington, were to cause, induce, and procure a large number of persons, whose names are to the grand jurors unknown, who had theretofore served as officers or private soldiers in the Army of the United States during the War of the Rebellion, or were widows of such officers or soldiers, and who by reason of such service were entitled to file by agent upon public lands of the United States, situated in the State and district of Montana, and which lands were then and there or would thereafter become subject to entry under the homestead laws of the United States, each, respectively, to execute, sign, and swear to a homestead declaratory statement and affidavit for the entry of a certain tract of public land of the United States, situated in the State and district of Montana, and to sign and acknowledge a power of attorney appointing the said Jesse T. Morehead agent, giving the said Jesse T. Morehead authority to act as agent for each of them, respectively, in filing upon said tracts of public land situated in the State of Montana, in each of which said homestead declaratory statements, to be signed, executed, and sworn to by each of said persons, respectively, as aforesaid, the said persons so signing the same would state under oath, in substance
and to the effect, that such location therein authorized was

5 made for the exclusive use and benefit of the person making and executing said homestead declaratory statement for the purpose of actual settlement upon and cultivation of the lands entered by the person executing said homestead declaratory statement, and not either directly or indirectly for the use or benefit of any other person, and that the attorney of the person executing said homestead declaratory statement had no interest, present or prospective, in the premises, and that the person executing said homestead declaratory statement had made no arrangement or agreement with such attorney or any other person for any sale or attempted sale or relinquishment of the entry, to be made by the filing of said declaratory statement, in any manner or for any consideration whatever.

And it was further a part of said conspiracy that such persons **executing, signing, and swearing to such homestead declaratory statements and affidavits, or any of them, should never comply with**

the homestead laws of the United States by establishing residence upon or cultivating the tracts of land so to be entered by each of them, respectively, as aforesaid, but it was a part of said conspiracy that the said Jesse T. Morehead, acting as agent for each of said persons, respectively, and as authorized so to do by the power of attorney, executed by each of said respective persons, should receive and file said homestead declaratory statements in the United States land offices, at Havre or Glasgow, in the State and district of Montana, after filling out and signing for each of said respective persons executing and signing said homestead declaratory statements, and filing in the proper land office an application to enter some tract of public land belonging to the United States and subject to entry under the homestead laws of the United States, and to have

6 said applications to enter accepted and allowed by the officers in charge of said United States land offices at Havre or Glasgow, in the State and district of Montana, and the officers of the General Land Office of the United States, and by virtue of such acceptance and allowance to have the said United States of America withdraw the divers tracts of land embraced within said divers filings and entries from entry under any of the public land laws of the United States and by virtue of the acceptance and allowance of said applications to enter said tracts of land as aforesaid, and by the granting of the right of possession thereof by the United States to said divers entrymen, because of such acceptance and allowance to withdraw said tracts of land from entry under any of the public land laws of the United States for a period of at least six months from and after the date of the acceptance by the United States of said applications and the allowance of such entries.

And it was further a part of said conspiracy that the persons executing, signing, and swearing to said declaratory statements, and for whom the said Jesse T. Morehead was to act as agent in filing said declaratory statements and applications to enter said land, did not at the time of so executing, signing, and swearing to said homestead declaratory statements, and would not at any time thereafter intend to comply with the homestead laws of the United States by settling, residing upon, and cultivating said lands so as to entitle such persons to receive patents from the United States for the same, and that the applications to enter said lands by the said Jesse T. Morehead as agent for said divers persons were not to be made by said Jesse T. Morehead as such agent in good faith for the purpose of securing homestead entries for them or any of them with the intent for them or any of them to comply with the homestead laws of the

7 United States so as to receive patents therefor from the United States, but it was the purpose of said conspiracy that the said Jesse T. Morehead, after the filing of said homestead declaratory statements and said applications to enter, and after the same had been accepted and allowed, and during the time said tracts of land should be withdrawn from entry under any of the public-land laws

of the United States by virtue of the acceptance and allowance of said entries, to procure and receive from such persons relinquishments of said entries for the purpose of selling and disposing of said relinquishments for money and other valuable considerations to other persons desirous of entering public lands of the United States under the homestead laws of the United States and who were qualified so to do.

And in pursuance of said unlawful and felonious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said Merrill D. Herrington, on the 27th day of February, 1914, at Fenton, in the State and eastern district of Michigan, did cause, procure, and induce one Charles H. Vosburgh, who had theretofore served as a soldier in the Army of the United States in the War of the Rebellion, and who was then and there qualified to enter public lands of the United States under the homestead laws of the United States, to make and execute and sign a certain homestead declaratory statement in writing and under oath, showing and stating the qualifications of the said Charles H. Vosburgh to enter public lands of the United States under the homestead laws of the United States; and which said homestead declaratory statement was in the words and figures following, to wit:

8

4—545.

Department of the Interior. Homestead declaratory statement.

U. S. Land Office, ———, No. —. Receipt No. —.

[NOTE.—This form may be used where the declaratory statement is filed by an agent under section 2309, Revised Statutes.]

I, Charles H. Vosburgh, of the village of Fenton, Genesee County, and State of Michigan, do solemnly swear that I served for a period of three years and five months in the Army of the United States during the War of the Rebellion, and was honorably discharged therefrom, as shown by a statement of such service herewith, and that I have remained loyal to the Government, and that I have never made a homestead entry or filed a declaratory statement under section 2290, section 2304 as amended by the act of March 1, 1901 (31 Stat., 847), or section 2309 of the Revised Statutes; that I am not the proprietor of more than one hundred and sixty acres of land in any State or Territory; that since August 30, 1890, I have not entered and acquired title to, nor am I now claiming under an entry made under any of the nonmineral public-land laws, an amount of land which, together with the land now applied for, will exceed in the aggregate 320 acres; that I have appointed, by power of attorney duly executed on the 27th day of February, A. D. 1914 (or I do hereby appoint), Jesse T. Morehead, of Chinook County and State of Montana, my true and lawful agent, under

section 2309 aforesaid, to select for me and in my name and file my declaratory statement for a homestead right under the aforesaid sections; and I hereby give notice of my intention to claim and enter said tract under said statute; that the location herein authorized is made for my exclusive use and benefit, for the purpose of my actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person; that my said attorney has no interest, present or prospective, in the premises; and that I have made no arrangement or agreement with him or any other person for any sale or attempted sale or relinquishment of my claim in any manner or for any consideration whatever; and that I have not signed this declaration in blank.

CHARLES H. VOSBURGH.

I hereby certify that the foregoing affidavit was read to or by affiant in my presence before affiant affixed signature thereto; that affiant is to me personally known (or has been satisfactorily identified before me by (give full name and post-office address)); that I verily believe affiant to be a qualified applicant and the identical person hereinbefore described; and that said affidavit was duly subscribed and sworn to before me at my office in the village of Fenton, Genesee County, State of Michigan, this 27th day of February, 1914.

[SEAL.]

DAVID S. FRACKELTON,

Notary Public, Genesee County, Michigan.

My commission expires Dec. 5th, 1914.

By virtue of the foregoing, and of a certain power of attorney therein named, duly executed on the — day of —, 19 —, and filed herewith, I hereby select the — section —, township —, range —, — meridian, as the homestead claim of —, the aforesaid, and do solemnly swear that the same is filed in good faith for the purposes therein specified; and that I have no interest or authority in the matter, present or prospective, beyond the filing of the same as the true and lawful agent of the said —, as provided by section 2309 of the Revised Statutes of the United States.

_____,
Agent.

Sworn to and subscribed before me this — day of —, 19 —.
[Official seal.] _____,

(Official designation of officer.)

REVISED STATUTES OF THE UNITED STATES. TITLE LXX.—CRIMES.—
CHAP. 4.

SEC. 5392. Every person who having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true is guilty of perjury and shall be punished by a fine of not more than two thousand dollars,

and by imprisonment at hard labor not more than five years; and shall, moreover, thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed. (See Sec. 1750.)

NOTE.—In addition to the above penalty every person who knowingly or willfully in anywise procures the making or presentation of any false or fraudulent affidavit pertaining to any matter within the jurisdiction of the Secretary of the Interior may be punished by fine or imprisonment.

9 The said Charles H. Vosburgh then and there and at the time of the making, signing, and subscribing of the aforesaid declaratory statement taking his the said Charles H. Vosburgh's oath, and being then and there duly sworn by and before David S. Frackelton, who was then and there a duly appointed, qualified, commissioned, and acting notary public in and for Genesee County, State of Michigan, and who then and there had due and lawful authority to administer the oath to the said Charles H. Vosburgh, and said matter being a proceeding wherein a law of the United States authorized an oath to be taken and administered, to tell the truth, the whole truth, and nothing but the truth of and concerning the matters particularly set forth and contained in the aforesaid homestead declaratory statement.

And in further pursuance of said unlawful and felonious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said defendant, Jesse T. Morehead, on the 2nd day of April, 1914, at Havre, in the State and district of Montana, filed and caused to be filed in the United States Land Office at Havre, in the State and district of Montana, the aforesaid homestead declaratory statement so made, executed, signed, and sworn to by the said Charles H. Vosburgh on the 27th day of February, 1914, together with his, the said Jesse T. Morehead's, application, as agent for the said Charles H. Vosburgh, to enter a certain tract of public land of the United States situated in the State and district of Montana, which said application was attached to and made a part of the aforesaid homestead declaratory statement of the said Charles H. Vosburgh, and which said application was in the words and figures following, to wit:

10 "By virtue of the foregoing and of a certain power of attorney therein named, duly executed on the 27 day of February, 1914, and filed herewith, I hereby select the E2SE4, SW4SE4, SE4SW4 sec. 31, SW4 section 32 township 34 north, range 18 east, Montana meridian, as the homestead claim of Charles H. Vosburgh, the aforesaid, and do solemnly swear that the same is filed in good faith for the purposes therein specified, and that I have no interest or authority in the matter, present or prospective, beyond the filing of the same as the true and lawful agent of the said Charles H. Vosburgh, as provided by section 2309 of the Revised Statutes of the United States.

"JESSE T. MOREHEAD, *Agent*.

"I hereby certify that the foregoing affidavit was read to or by affiant in my presence before affiant affixed signature thereto; that

affiant is to me personally known; that I verily believe affiant to be the identical person hereinbefore described; and that said affidavit was duly subscribed and sworn to before me at my office in Havre, Hill County, Montana, within the Havre, Montana, land district, this first day of April, 1914.

[SEAL.]

"W. B. PYPER, U. S. Commissioner."

11 And in further pursuance of said unlawful and felonious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said Merrill D. Herrington, on the 30th day of March, 1914, at Fenton, in the Eastern District of Michigan, did cause, procure, and induce one Charles L. Bentley, who had theretofore served as a soldier in the Army of the United States during the War of the Rebellion, and who was then and there qualified to enter public lands of the United States under the homestead laws of the United States, to make and execute and sign a certain homestead declaratory statement, in writing and under oath, showing and stating the qualifications of the said Charles L. Bentley to enter public lands of the United States under the homestead laws of the United States, which said homestead declaratory statement was in the words and figures following, to wit:

12

4—545.

Department of the Interior.—Homestead declaratory statement.

U. S. Land Office, ———, No. —. Receipt No. —.

[NOTE.—This form may be used where the declaratory statement is filed by an agent under section 2309, Revised Statutes.]

I, Charles L. Bentley, of Fenton, Genesee County and State of Michigan, do solemnly swear that I served for a period of 5 years, U. S. service, in the Army of the United States, during the *during the* Civil War, and was honorably discharged therefrom, as shown by a statement of such service herewith, and that I have remained loyal to the Government; and that I have never made a homestead entry or filed a declaratory statement under section 2290, section 2304 as amended by the act of March 1, 1901 (31 Stat., 847), or section 2309 of the Revised Statutes; that I am not the proprietor of more than one hundred and sixty acres of land in any State or Territory; that since August 30, 1890, I have not entered and acquired title to, nor am I now claiming, under an entry made under any of the non-mineral public-land laws, an amount of land which, together with the land now applied for, will exceed in the aggregate 320 acres; that I have appointed, by power of attorney duly executed on the 30th day of March, 1914 (or I do hereby appoint), Jesse T. Morehead, of Chinook, Blaine County, and State of Montana, my true and lawful agent, under section 2309 aforesaid, to select for me and in my name, and file my declaratory statement for a homestead right

under the aforesaid sections; and I hereby give notice of my intention to claim and enter said tract under said statute; that the location herein authorized is made for my exclusive use and benefit, for the purpose of my actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person; that my said attorney has no interest, present or prospective, in the premises; and that I have made no arrangement or agreement with him or any other person for any sale or attempted sale or relinquishment of my claim in any manner or for any consideration whatever, and that I have not signed this declaration in blank.

CHARLES L. BENTLEY.

I hereby certify that the foregoing affidavit was read to or by affiant in my presence before affiant affixed signature thereto; that affiant is to me personally known (or has been satisfactorily identified before me by me); that I verily believe affiant to be a qualified applicant and the identical person hereinbefore described; and that said affidavit was duly subscribed and sworn to before me, at my office in Fenton, Genesee County, State of Mich., this 30th day of March, 1914.

[SEAL.]

WILLIAM BUTCHER,
Notary Public, Genesee Co., Mich.

My commission expires Feb. 10, 1915.

By virtue of the foregoing, and of a certain power of attorney therein named, duly executed on the — day of —, 19 —, and filed herewith, I hereby select the — section —, township —, range —, — meridian, as the homestead claim of —, the aforesaid, and do solemnly swear that the same is filed in good faith for the purposes therein specified, and that I have no interest or authority in the matter, present or prospective, beyond the filing of the same as the true and lawful agent of the said —, as provided by section 2309 of the Revised Statutes of the United States.

_____,
Agent.

Sworn to and subscribed before me this — day of —, 19 —.
[Official seal.]

(Official designation of officer.)

REVISED STATUTES OF THE UNITED STATES. TITLE LXX.—CRIMES.—
CHAP. 4.

SEC. 5392. Every person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury and shall be punished by a fine of not more than two thousand dollars, and by imprisonment, at hard labor, not more than five years; and

shall, moreover, thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed. (See Sec. 1750.)

NOTE.—In addition to the above penalty, every person who knowingly or willfully in anywise procures the making or presentation of any false or fraudulent affidavit pertaining to any matter within the jurisdiction of the Secretary of the Interior may be punished by fine or imprisonment.

13 The said Charles L. Bentley then and there and at the time of the making, signing, and subscribing of the aforesaid declaratory statement taking his, the said Charles L. Bentley's, oath and being then and there duly sworn by and before William Butcher, a duly appointed, qualified, commissioned, and acting notary public for the county of Genesee, State of Michigan, and who then and there had due and lawful authority to administer the oath to the said Charles L. Bentley and said matter being a proceeding wherein a law of the United States authorized an oath to be administered, to tell the truth, the whole truth, and nothing but the truth of and concerning the matters particularly set forth and contained in the aforesaid homestead declaratory statement.

And in further pursuance of said unlawful and felonious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said defendant, Jesse T. Morehead, on the 26th day of June, 1914, at Glasgow, in the State and district of Montana, filed and caused to be filed in the United States Land Office at Glasgow, in the State and district of Montana, the aforesaid homestead declaratory statement, so made, executed, signed, and sworn to by the said William Butcher on the 30th day of March, 1914, together with his, the said Jesse T. Morehead's, application as agent for the said William Butcher to enter a tract of public land of the United States, situated in the State and district of Montana, which said application was attached to and made a part of the aforesaid declaratory statement of the said William Butcher, and which said application was in the words and figures following, to wit:

14 "By virtue of the foregoing, and of a certain power of attorney therein named, duly executed on the 30th day of March, 1914, and filed herewith, I hereby select the SW4NE4, S2NW4, N2SW4, NW4SE4, sec. 13; SE4NE4, NE4SE4, section 14, township 32, range 39 east meridian, as the homestead claim of Charles L. Bentley, the aforesaid, and do solemnly swear that the same is made in good faith for the purposes therein specified, and that I have no interest or authority in the matter, present or prospective, beyond the filing of the same as the true and lawful agent of the said Charles L. Bentley, as provided by section 2309 of the Revised Statutes of the United States. I have made no arrangements for any sale or attempted sale of relinquishment of said claim.

"JESSE T. MOREHEAD, *Agent*.

"I hereby certify that the foregoing affidavit was read to or by affiant in my presence before affiant affixed signature thereto; that affiant is to me personally known (or has been satisfactorily identified

before me by ———); that I verily believe affiant to be the identical person hereinbefore described; and that said affidavit was duly subscribed and sworn to before me, at my office, in Glasgow, Montana, within the Glasgow, Montana, land district, this 26th day of June, 1914.

“THOMAS R. JAMES, *Register*.

“Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.”

15

Second count.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge, and present:

That on February 7th, 1914, in the State and district of Montana and within the jurisdiction of this court, one Jesse T. Morehead, late of the State and district of Montana, named as defendant herein, unlawfully and feloniously did conspire, combine, confederate, and agree with one John C. Chapman and with divers other persons, whose names are to the grand jurors unknown, to knowingly, wilfully, wrongfully, unlawfully, and feloniously cause, induce, and procure Robert Stokes and Gilbert M. L. Morrison, and a large number of other persons whose names are to the grand jurors unknown, who had theretofore served as officers or private soldiers in the War of the Rebellion or were widows of such officers or soldiers, and who by reason of such service were entitled to file, by agent, homestead declaratory statements and application to enter public lands of the United States subject to entry under the homestead laws of the United States, to make and file homestead declaratory statements, applications, and affidavits to enter, under the homestead laws of the United States, certain tracts of public land of the United States situated in the State of Montana, which said lands were then, or would thereafter become, subject to entry under said homestead laws, and to cause, induce, and procure said persons making and filing such homestead declaratory statements, applications, and affidavits to enter said lands situated in said district of Montana, to commit perjury in the making and filing of the aforesaid homestead declaratory statements, applications, and affidavits; said unlawful and felonious conspiracy, combination, confederation, and agreement being one for causing, inducing, and procuring said persons to commit perjury by the means and in the manner described, that is to say:

The said defendant, Jesse T. Morehead, and the said John C. Chapman were to cause, induce, and procure a large number of persons, whose names are to the grand jurors unknown, who
16 had theretofore served as officers or private soldiers in the Army of the United States during the War of the Rebellion or were widows of such officers or soldiers, and who by reason of

such service were entitled to file, by agent, upon public lands of the United States situated in the State and district of Montana, and which lands then or would thereafter become subject to entry under the homestead laws of the United States, each respectively to execute, sign, and swear to a homestead declaratory statement and affidavit for the entry of a certain tract of public land of the United States situated in the State and district of Montana, and to sign, execute, and acknowledge a power of attorney appointing the said Jesse T. Morehead agent, giving the said Jesse T. Morehead authority to act as agent for each of them, respectively, in filing upon said tracts of public land situated in the State of Montana, in each of which said homestead declaratory statements to be signed, executed, and sworn to by each of said persons, respectively, as aforesaid, the said persons so signing the same would state under oath in substance and to the effect that such location therein authorized was made for the exclusive use and benefit of the person making and executing said homestead declaratory statement for the purpose of actual settlement upon and cultivation of the lands entered by the person executing said homestead declaratory statement and not either directly or indirectly for the use or benefit of any other person, and that the attorney of the person executing said homestead declaratory statement had no interest, present or prospective, in the premises, and that the person executing said homestead declaratory statement had made no arrangement or agreement with such attorney, or any other person, for any sale or attempted sale or relinquishment of the entry to be made by the filing of said homestead declaratory statement, in any manner or for any consideration whatever.

- 17 And it was further a part of said conspiracy that such persons executing, signing, and swearing to such homestead declaratory statements and affidavits, or any of them, should never comply with the homestead laws of the United States by establishing residence upon or cultivating the tracts of land so to be entered by each of them, respectively, as aforesaid, but it was a part of said conspiracy that the said Jesse T. Morehead, acting as agent for each of said persons, respectively, and as authorized so to do by the power of attorney, executed by each of said respective persons, should receive and file said homestead declaratory statement in the United States Land Office at Havre or Glasgow, in the State and district of Montana, after filling out and signing said declaratory statements and filing in the proper land office an application to enter some tract of public land belonging to the United States and subject to entry, under the homestead laws of the United States, and to have said applications to enter accepted and allowed by the officers in charge of said United States land offices at Havre or Glasgow, in the State and district of Montana, and the officers of the General Land Office of the United States, and by virtue of such acceptance and allowance to have the said United States of America withdraw the divers tracts of land embraced within said divers filings and entries from entry under any

of the public land laws of the United States and by virtue of the acceptance and allowance of said applications to enter said tracts of land as aforesaid, and by the granting of the right of possession thereof by the United States to said divers entrymen, because of such acceptance and allowance, to withdraw said tracts of land from entry under any of the public land laws of the United States for a period of at least six months from and after the date of the acceptance by the United States of said applications and the allowance of such entries.

And it was further a part of said conspiracy that the persons
executing, signing, and swearing to said declaratory state-
18 ments, and for whom the said Jesse T. Morehead was to act
as agent in filing said declaratory statements and applications
to enter said land, did not at the time of so executing, signing, and
swearing to said homestead declaratory statements, and would not
at any time thereafter, intend to comply with the homestead laws
of the United States by settling, residing upon, and cultivating said
lands, so as to entitle such persons to receive patents from the United
States for the same, and that the applications to enter said lands by
the said Jesse T. Morehead as agent for said divers persons were not
to be made by said Jesse T. Morehead as such agent in good faith for
the purpose of securing homestead entries for them or any of them
with the intent for them or any of them to comply with the home-
stead laws of the United States, so as to receive patents therefor
from the United States, but it was the purpose of said conspiracy
that the said Jesse T. Morehead, after the filing of said homestead
declaratory statements and said applications to enter, and after the
same had been accepted and allowed, and during the time said tracts
of land should be withdrawn from entry under any of the public land
laws of the United States by virtue of the acceptance and allowance
of said entries, to procure and receive from such persons relinquish-
ments of said entries for the purpose of selling and disposing of said
relinquishments for money and other valuable considerations to other
persons desirous of entering public lands of the United States under
the homestead laws of the United States and who were qualified so
to do.

And in pursuance of said unlawful and felonious conspiracy, com-
bination, confederation, and agreement, and to effect the object of
the same, the said John C. Chapman, on the 21st day of February,
1914, at Milan, in the State and western district of Missouri.
19 did cause, procure, and induce one Robert Stokes, who had
theretofore served as a soldier in the Army of the United
States in the War of the Rebellion, and who was then and there
qualified to enter public lands of the United States under the home-
stead laws of the United States, to make, execute, and sign a certain
declaratory statement in writing and under oath showing and stating
the qualifications of the said Robert Stokes to enter public lands of
the United States under the homestead laws of the United States;

and which said homestead declaratory statement was in the words and figures following, to wit:

20

4—545.

Department of the Interior. Homestead declaratory statement.

U. S. Land Office, ———, No. —. Receipt No. —.

[NOTE.—This form may be used where the declaratory statement is filed by an agent under section 2309, Revised Statutes.]

I, Robert Stokes, of Sullivan County and State or Territory of Missouri, do solemnly swear that I served for a period of two years, one month, and eleven days in the Army of the United States during the Rebellion, and was honorably discharged therefrom, as shown by a statement of such service herewith, and that I have remained loyal to the Government; and that I have never made a homestead entry or filed a declaratory statement under section 2290, section 2304 as amended by the act of March 1, 1901 (31 Stat., 847), or section 2309 of the Revised Statutes; that I am not the proprietor of more than one hundred and sixty acres of land in any State or Territory; that since August 30, 1890, I have not entered and acquired title to, nor am I now claiming, under an entry made under any of the nonmineral public-land laws, an amount of land which, together with the land now applied for, will exceed in the aggregate 320 acres; that I have appointed, by power of attorney duly executed on the 21st day of February, 1914 (or I do hereby appoint), Jesse T. Morehead, of Chinook, Blaine County and State of Montana, my true and lawful agent, under section 2309 aforesaid, to select for me and in my name, and file my declaratory statement for a homestead right under the aforesaid sections; and I hereby give notice of my intention to claim and enter said tract under said statute; that the location herein authorized is made for my exclusive use and benefit, for the purpose of my actual settlement and cultivation, and not, either directly or indirectly, for the use or benefit of any other person; that my said attorney has no interest, present or prospective, in the premises, and that I have made no arrangement or agreement with him or any other person for any sale or attempted sale or relinquishment of my claim in any manner or for any consideration whatever; and that I have not signed this declaration in blank.

ROBERT (his x mark) STOKES.

Witness to mark:

JOHN C. CHAPMAN.

I hereby certify that the foregoing affidavit was read to or by affiant in my presence before affiant affixed signature thereto; that affiant is to me personally known (give full name and post-office address); that I verily believe affiant to be a qualified applicant and the identical person hereinbefore described; and that said affidavit

was duly subscribed and sworn to before me at my office in Milan, Sullivan Co., Missouri, this 21st day of February, 1914.

[SEAL.]

MARK H. MAIRS,
County Clerk.

By virtue of the foregoing, and of a certain power of attorney therein named, duly executed on the — day of —, 19 —, and filed herewith, I hereby select the — section —, township —, range —, — meridian, as the homestead claim of —, the aforesaid, and do solemnly swear that the same is filed in good faith for the purposes therein specified, and that I have no interest or authority in the matter, present or prospective, beyond the filing of the same as the true and lawful agent of the said —, as provided by section 2309 of the Revised Statutes of the United States.

Agent.

Sworn to and subscribed before me this — day of —, 19 —.
[Official seal.] _____,

(Official designation of officer.)

REVISED STATUTES OF THE UNITED STATES. TITLE LXX.—CRIMES.—
CHAP. 4.

SEC. 5392. Every person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury and shall be punished by a fine of not more than two thousand dollars, and by imprisonment at hard labor not more than five years; and shall, moreover, thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed. (See sec. 1750.)

NOTE.—In addition to the above penalty, every person who knowingly or willfully in anywise procures the making or presentation of any false or fraudulent affidavit pertaining to any matter within the jurisdiction of the Secretary of the Interior may be punished by fine or imprisonment.

21 The said Robert Stokes then and there and at the time of the making, signing, and subscribing of the aforesaid declaratory statement, taking his the said Robert Stokes' oath, and being then and there duly sworn by and before Mark H. Mairs, then and there the duly elected, qualified, and acting county clerk of Sullivan County, State of Missouri, and who then and there had due and lawful authority to administer the oath to the said Robert Stokes, and said matter being a proceeding wherein a law of the United States authorized an oath to be administered, to tell the truth, the whole truth, and nothing but the truth of and concerning the matters particularly set forth and contained in the aforesaid homestead declaratory statement.

And in further pursuance of said unlawful and felonious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said defendant, Jesse T. Morehead, on the 4th day of March, 1914, at Havre, in the State and district of

Montana, filed and caused to be filed in the United States land office at Havre, in the State and district of Montana, the aforesaid homestead declaratory statement so made, executed, signed, and sworn to by the said Robert Stokes on the 21st day of February, 1914, together with his, the said Jesse T. Morehead's application, as agent for the said Robert Stokes to enter a tract of public land of the United States situated in the State and district of Montana, which said application was attached to and made a part of the aforesaid declaratory statement of the said Robert Stokes, and which said application was in words and figures following, to wit:

22 "By virtue of the foregoing, and of a certain power of attorney therein named, duly executed on the 21st day of February, 1914, and filed herewith, I hereby select the NW. $\frac{1}{4}$ sec. 35, NE. $\frac{1}{4}$ section 34, township 37 north, range 21 east, Montana meridian, as the homestead claim of Robert Stokes, the aforesaid, and do solemnly swear that the same is filed in good faith for the purposes therein specified, and that I have no interest or authority in the matter, present or prospective, beyond the filing of the same as the true and lawful agent of the said Robert Stokes, as provided by section 2309 of the Revised Statutes of the United States.

"JESSE T. MOREHEAD, *Agent*.

"Sworn to and subscribed before me this 4th day of March, 1914.

[SEAL.]

"M. W. HUTCHINSON, *Register*."

23 And in further pursuance of said unlawful and felonious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said John C. Chapman, on the 25th day of February, at Milan, in the State and western district of Missouri, did cause, procure, and induce one Gilbert M. L. Morrison, who had theretofore served as a soldier in the Army of the United States during the War of the Rebellion, and who was then and there qualified to enter public lands of the United States under the homestead laws of the United States, to make and execute and sign a certain homestead declaratory statement, in writing and under oath, showing and stating the qualifications of the said Gilbert M. L. Morrison to enter public lands of the United States under the homestead laws of the United States, which said homestead declaratory statement was in the words and figures following, to wit:

24

4—545.

Department of the Interior. Homestead declaratory statement.

U. S. Land Office, ———, No. —. Receipt No. —.

[NOTE.—This form may be used where the declaratory statement is filed by an agent, under section 2309, Revised Statutes.]

I, Gilbert M. L. Morrison, of Sullivan County and State or Territory of Missouri, do solemnly swear that I served for a period of one year in the Army of the United States, during the War of the Rebellion, and was honorably discharged therefrom, as shown by a statement of such service herewith, and that I have remained loyal to

the Government; and that I have never made a homestead entry or filed a declaratory statement under section 2290, section 2304 as amended by the act of March 1, 1901 (31 Stat., 847), or section 2309 of the Revised Statutes; that I am not the proprietor of more than one hundred and sixty acres of land in any State or Territory; that since August 30, 1890, I have not entered and acquired title to, nor am I now claiming, under an entry made under any of the nonmineral public-land laws, an amount of land which, together with the land now applied for, will exceed in the aggregate 320 acres; that I have appointed by power of attorney duly executed on the 25th day of February, 1914, (or I do hereby appoint) Jesse T. Morehead, of Chinook, Montana, County and State of ———, my true and lawful agent, under section 2309 aforesaid, to select for me and in my name, and file my declaratory statement for a homestead right under the aforesaid sections; and I hereby give notice of my intention to claim and enter said tract under said statute; that the location herein authorized is made for my exclusive use and benefit, for the purpose of my actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person; that my said attorney has no interest, present or prospective, in the premises, and that I have made no arrangement or agreement with him or any other person for any sale or attempted sale or relinquishment of my claim in any manner or for any consideration whatever, and that I have not signed this declaration in blank.

GILBERT M. L. MORRISON.

I hereby certify that the foregoing affidavit was read to or by affiant in my presence before affiant affixed signature thereto; that affiant is to me personally known (give full name and post-office address); that I verily believe affiant to be a qualified applicant and the identical person hereinbefore described; and that said affidavit was duly subscribed and sworn to before me at my office in Milan, Sullivan County, Missouri, this 25th day of February, 1914.

[SEAL.]

MARK H. MAIRS,

County Clerk.

By virtue of the foregoing, and of a certain power of attorney therein named, duly executed on the — day of ———, 19 —, and filed herewith, I hereby select the ——— section ———, township ———, range ———, ——— meridian, as the homestead claim of ———, the aforesaid, and do solemnly swear that the same is filed in good faith for the purposes therein specified, and that I have no interest or authority in the matter, present or prospective, beyond the filing of the same as the true and lawful agent of the said ———, as provided by section 2309 of the Revised Statutes of the United States.

_____,
Agent.

Sworn to and subscribed before me this — day of ———, 19—.
(Official seal.) _____,

(Official designation of officer.)

REVISED STATUTES OF THE UNITED STATES. TITLE LXX.—CRIMES.—
CHAP. 4.

SEC. 5392. Every person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury and shall be punished by a fine of not more than two thousand dollars, and by imprisonment, at hard labor, not more than five years; and shall, moreover, thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed. (See sec. 1750.)

NOTE.—In addition to the above penalty, every person who knowingly or willfully in anywise procures the making or presentation of any false or fraudulent affidavit pertaining to any matter within the jurisdiction of the Secretary of the Interior may be punished by fine or imprisonment.

25 The said Gilbert M. L. Morrison then and there and at the time of the making, signing, and subscribing of the aforesaid declaratory statement taking his, the said Gilbert M. L. Morrison's oath, and being then and there duly sworn by and before Mark H. Mairs, then and there the duly elected, qualified, and acting county clerk of Sullivan County, State of Missouri, and who then and there had due and lawful authority to administer the oath to the said Gilbert M. L. Morrison, and said matter being a proceeding wherein a law of the United States authorized an oath to be administered, to tell the truth, the whole truth, and nothing but the truth of and concerning the matters particularly set forth and contained in the aforesaid homestead declaratory statement.

And in further pursuance of said unlawful and felonious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said defendant, Jesse T. Morehead, on the 4th day of March, 1914, at Havre, in the State and district of Montana, filed and caused to be filed in the United States land office at Havre, in the State and district of Montana, the aforesaid homestead declaratory statement so made, executed, signed, and sworn to by the said Gilbert M. L. Morrison on the 25th day of February, 1914, together with his, the said Jesse T. Morehead's, application as agent for the said Gilbert M. L. Morrison to enter a tract of public land of the United States situated in the State and district of Montana, which said application was attached to and made a part of the aforesaid declaratory statement of the said Gilbert M. L. Morrison, and which said application was in the words and figures following, to wit:

26 "By virtue of the foregoing, and of a certain power of attorney therein named, duly executed on the 25th day of February, 1914, and filed herewith, I hereby select the S. 2 SW. 4 sec. 22, S. 2 SE. 4 sec. 21, NE. 4 section 28, township 37 north, range 21 east, Montana meridian, as the homestead claim of Gilbert M. L. Morrison, the aforesaid, and do solemnly swear that the same is filed in good faith for the purposes therein specified, and that I have no interest or authority in the matter, present or prospective, beyond the filing of the same as the true and lawful agent of the said Gilbert

M. L. Morrison, as provided by section 2309 of the Revised Statutes of the United States.

"JESSE T. MOREHEAD, *Agent*.

"Sworn to and subscribed before me this 4th day of March, 1914.

[SEAL.]

"M. W. HUTCHINSON, *Register*."

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

BURTON K. WHEELER,

United States Attorney, District of Montana.

27 (Indorsed:) No. 2849. United States District Court, District of Montana. United States of America *v.* Jesse T. Morehead. Indictment: A true bill. W. J. MacHaffie, foreman of grand jury. Burton K. Wheeler, United States attorney, district of Montana. Witnesses: David E. Schultz, Merrill D. Herrington, Emory Denton, Charles H. Vosburgh, Charles L. Bentley, D. S. Frackelton, M. W. Hutchinson, John C. Chapman, William Ewing, Gilbert M. L. Morrison, Seymour P. Thompson, Vernon C. Smith, Ernest T. Winter, Franklin Potter, Gilbert Angus, Gertie Amundson, Robert Stokes, Emory Girdner, Perry Harter. Presented by the grand jury in open court, by their foreman, in their presence, and filed this 30 day of June A. D. 1916. Geo. W. Sproule, clerk, by C. R. Garlow, deputy.

28 Thereafter, on July 6, 1916, a demurrer to the indictment was duly filed herein in the words and figures following, to wit:

29 In the District Court of the United States in and for the District of Montana.

UNITED STATES OF AMERICA, PLAINTIFF,	} Demurrer.
<i>vs.</i>	
JESSE T. MOREHEAD, DEFENDANT.	

Now comes the defendant, Jesse T. Morehead, and demurs to the indictment in the above entitled action on file herein and for grounds of demurrer alleges:

1. That said indictment does not state facts sufficient to constitute an offense against the laws of the United States.

2. That said indictment is ambiguous in this, that it can not be determined therefrom what crime, if any, has been committed by defendant.

3. That said indictment in each count thereof attempts to charge the commission of more than one offense.

W. B. SANDS,

Attorney for Defendant, Chinook, Mont.

Filed July 6, 1916.

GEO. W. SPROULE, *Clerk*.

30 Thereafter, on July 14, 1916, an order sustaining the demurrer was duly made and entered herein in the words and figures following, to wit:

UNITED STATES	}	No. 2849.
<i>vs.</i>		
JESSE T. MOREHEAD.		

This cause, heretofore submitted to the court upon demurrer to the indictment, came on regularly at this time for the judgment and decision of the court; and now, after due consideration, it is ordered that said demurrer to the indictment be, and hereby is, sustained. Memo opinion filed.

Entered in open court July 14, 1916.

GEO. W. SPROULE, *Clerk.*

31 Thereafter, on July 14, 1916, the memo opinion of the court was duly filed herein in the words and figures following, to wit:

32	U. S.	}	No. 2849.
	<i>vs.</i>		
	MOREHEAD.		

Herein the demurrer to the indictment is sustained.

Memo.: There is no law, directly or by implication, requiring affidavits to soldiers' declaratory statements. The Land Department is not authorized to exact them. Consequently, no law "authorizes an oath to be administered" for such affidavits. As only when an oath is authorized to be administered is perjury possible, it follows the false affidavits herein do not constitute perjury.

Since not perjury, to procure them is not subornation of perjury, and an agreement to procure them is not a conspiracy to suborn perjury. Hence, the indictment charges no offense.

Filed July 14, 1916.

GEO. W. SPROULE, *Clerk.*

33 Thereafter, on August 11, 1916, petition for writ of error was duly filed herein, in the words and figures following, to wit:

In the District Court of the United States for the District of Montana.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,	}
<i>vs.</i>	
JESSE T. MOREHEAD, DEFENDANT IN ERROR.	

Petition for writ of error.

Now comes the United States of America, plaintiff herein, and says:

That on or about the 14th day of July, 1916, the District Court of the United States for the District of Montana rendered and entered

a decision sustaining the defendant's demurrer to the indictment herein, in which said decision and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this plaintiff prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of the errors complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

B. K. WHEELER,
United States Attorney, District of Montana,
Attorney for Plaintiff.

Filed Aug. 11, 1916.

GEO. W. SPROULE, *Clerk.*

34 Thereafter, on August 11, 1916, an assignment of errors was duly filed herein, in the words and figures following, to wit:

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
vs.
JESSE T. MOREHEAD, DEFENDANT IN ERROR.

Assignment of errors.

The plaintiff in this action, in connection with its petition for writ of error, makes the following assignment of errors, which it avers exists:

First. The court erred in sustaining the defendant's demurrer to the indictment.

Second. The court erred in holding that the indictment does not state facts sufficient to constitute an offense against the laws of the United States.

Third. The court erred in holding that section 2309, Revised Statutes of the United States does not require homestead declaratory statements, filed under and in accordance with the provisions of said section, to be made under oath.

Fourth. The court erred in holding that there is no law requiring homestead declaratory statements, filed under and in accordance with the provisions of section 2309, Revised Statutes of the United States, to be made under oath.

Fifth. The court erred in holding that there is no law authorizing the Land Department of the United States to require declaratory statements, filed under and in accordance with the provisions of section 2309, Revised Statutes of the United States, to be made under oath.

Sixth. The court erred in holding that an agreement to procure the making under oath and filing of homestead declaratory state-

35 ments under and in accordance with the provisions of section 2309, Revised Statutes of the United States, is not a conspiracy to suborn perjury.

Wherefore, the plaintiff prays that the said decision and the order sustaining the defendant's demurrer to the indictment, be reversed.

B. K. WHEELER,

United States Attorney, District of Montana.

Attorney for Plaintiff.

Filed August 11, 1916.

GEO. W. SPROULE, *Clerk.*

36 Thereafter, on August 11, 1916, an order allowing writ of error was duly filed and entered herein as follows, to wit:

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR, }

vs.

JESSE T. MOREHEAD, DEFENDANT IN ERROR. }

Order allowing writ of error.

This 11th day of August, 1916, comes the plaintiff, United States of America, by its attorney, and files herein and presents to the court its petition praying for the allowance of a writ of error, and an assignment of errors intended to be urged by him, praying also that a transcript of the record and proceedings and papers upon which the decision herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as are proper in the premises.

In consideration whereof the court does hereby allow the writ of error this 11th day of August, 1916.

BOURQUIN, *District Judge.*

Filed and entered Aug. 11, 1916.

GEO. W. SPROULE, *Clerk.*

37 Thereafter, on August 11, 1916, a writ of error was duly issued herein, which original writ of error, with admission of service thereof and answer of the court thereto, is hereto annexed, being in the words and figures following, to wit:

38 *Writ of error.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judge of the District Court of the United States for the District of Montana, Greeting:

Because of the record and proceedings, and also in the rendition of the decision sustaining a demurrer to an indictment, which is in said district court before you, between the United States of America and Jesse T. Morehead, a manifest error has happened to the great

damage of the said United States of America as by its complaint appears. We, being willing that the error, if any has been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, that under your hand and seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington on the 9th day of October, 1916, in the Supreme Court then and there to be held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, the 11th day of August, in the year of our Lord one thousand nine hundred and sixteen.

[SEAL.]

GEO. W. SPROULE,

*Clerk of the District Court of the United States
for the District of Montana,*

By HARRY H. WALKER,
Deputy Clerk.

Allowed by—

GEO. M. BOURQUIN,
District Judge.

39 UNITED STATES OF AMERICA,
District of Montana, ss.

Homer G. Murphy, being first duly sworn, deposes and says that he is a duly appointed, qualified, and acting assistant United States attorney for the district of Montana; that affiant resides and has his office and the office of the United States attorney for the district of Montana in the city of Helena, in the county of Lewis and Clark County, State of Montana; that W. B. Sands, attorney for Jesse T. Morehead, the defendant named in the indictment and proceeding appealed to the Supreme Court of the United States, has his office and resides in the city of Chinook, in the State and district of Montana; that there is a regular daily communication by mail between said city of Helena and said city of Chinook; that on Saturday, the 12th day of August, 1916, at about the hour of twelve o'clock noon, affiant deposited in the United States post office, in said city of Helena, a full, true, correct, and complete copy of the foregoing and attached writ of error in said cause, which said copy was enclosed in an envelope, securely sealed, and postage paid thereon, and addressed and directed to W. B. Sands, Esq., attorney at law, Chinook, Montana, to be delivered to the above-named addressee as directed on said envelope.

HOMER G. MURPHY.

Subscribed and sworn to before me this 12th day of Augu't, 1916.

[SEAL.]

C. R. GARLOW,

Deputy Clerk U. S. District Court, District of Montana.

40

Answer of court to writ of error.

The answer of the honorable, the district judge of the United States for the district of Montana, to the foregoing writ.

The record and proceedings whereof mention is within made, with all things touching the same, I certify, under the seal of said court, to the honorable the Supreme Court of the United States, at the day and place within contained, in a certain schedule to this writ annexed, as within I am commanded.

By the court:

[SEAL]

GEO. W. SPROULE, *Clerk.*

41 (Indorsed:) #2849. United States District Court, District of Montana. United States of America, plaintiff in error, vs. Jesse T. Morehead, defendant in error. Writ of error and proof of service. Filed Aug. 12th, 1916. Geo. W. Sproule, clerk, by C. R. Garlow, deputy.

42 Thereafter, on September 4, 1916, a citation was duly issued herein, which original citation with admission of service thereof is hereto annexed, being in the words and figures following, to wit:

43 *Citation on writ of error.*

UNITED STATES OF AMERICA, ss.

To Jesse T. Morehead, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, on the 9th day of October, 1916, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the District of Montana, wherein the United States of America is plaintiff in error and you are defendant in error, to show cause, if any there be, why the decision and order of the District Court of the United States for the District of Montana sustaining the demurrer to the indictment, as in said writ of error mentioned, should not be reversed and corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Geo. M. Bourquin, judge of the District Court of the United States for the District of Montana, this 4th day of September, in the year of our Lord one thousand nine hundred and sixteen.

GEO. M. BOURQUIN,
*Judge of the District Court of the United
States for the District of Montana.*

Service of the within and foregoing citation accepted and receipt of copy thereof acknowledged this 7th day of September, 1916.

W. B. SANDS,
Solicitor for Defendant in Error.

44 (Indorsed:) No. 2849. District Court of the United States, District of Montana. United States of America, plaintiff in error, v. Jesse T. Morehead, defendant in error. Citation on writ of error. Filed Sept. 8, 1916. Geo. W. Sproule, clerk.

45 Thereafter, on September 8, 1916, a præcipe for transcript of record was duly filed herein, in the words and figures following, to wit:

46 In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,	}
v.	
JESSE T. MOREHEAD, DEFENDANT IN ERROR.	}

Præcipe for transcript of record.

To Jesse T. Morehead, defendant in error, and to W. B. Sands, his solicitor:

The undersigned, solicitor for the plaintiff in error herein, files and serves upon you its præcipe, in conformity with the rules of court, indicating the portions of the record in the above-entitled cause to be incorporated into the transcript of record herein, and which said portions of said record you are hereby notified the said plaintiff in error will incorporate and include in the record herein:

Said portions are as follows:

1. The indictment.
2. The demurrer to the indictment.
3. The order of the court sustaining the demurrer to the indictment.
4. The opinion and decision of the court rendered and filed July 14th, 1916, ordering that the demurrer to the indictment be sustained.
5. The petition for writ of error.
6. The assignment of errors accompanying the petition for writ of error.
7. The order of the court allowing the writ of error.
8. The writ of error and admission of service by defendant in error.
9. The citation and admission of service by defendant in error.
10. This præcipe.

B. K. WHEELER,

*United States Attorney for the District of Montana,
Solicitor for Plaintiff in Error.*

47 Service of the within and foregoing præcipe for transcript of record accepted and receipt of copy thereof acknowledged this 7th day of September, 1916.

W. B. SANDS,
Solicitor for Defendant in Error.

Filed Sept. 8, 1916.

GEO. W. SPROULE, *Clerk.*

48

Clerk's certificate to transcript of record.

UNITED STATES OF AMERICA,
District of Montana, ss:

I, Geo. W. Sproule, clerk of the United States District Court for the District of Montana, do hereby certify and return to the honorable the Supreme Court of the United States, that the foregoing volume, consisting of 48 pages, numbered consecutively from 1 to 48, inclusive, is a true and correct transcript of the pleadings, orders, decision, and all other proceedings in said cause required to be incorporated in the record on appeal therein by the præcipe of the plaintiff in error for said record on appeal, including said præcipe, and of the whole thereof, as appears from the original records and files of said court in my possession as such clerk; and I do further certify and return that I have annexed to said transcript and included within said pages the original writ of error and citation issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of sixteen $\frac{65}{100}$ dollars, and have been made a charge against the plaintiff in error.

In witness whereof I have hereunto set my hand and affixed the seal of said court at Great Falls, Montana, this 21st day of September, A. D. 1916.

[SEAL.]

GEO. W. SPROULE,

Clerk U. S. District Court, District of Montana.

(Indorsed:) File No. 25515. Montana D. C. U. S. Term No. 685. The United States, plaintiff in error, vs. Jesse T. Morehead. Filed September 28th, 1916. File No. 25515.

O

In the Supreme Court of the United States.

OCTOBER TERM, 1916.

THE UNITED STATES, PLAINTIFF IN ERROR,	} No. 685.
v.	
JESSE T. MOREHEAD.	

*IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF MONTANA.*

MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General and in accordance with the provisions of the Criminal Appeals Act, 34 Stat. 1246, moves the court to advance the above-entitled cause for hearing on a day convenient to the court.

Defendant and another were indicted in the District Court of the United States for the District of Montana for conspiring to commit an offense against the United States, to wit, the subornation of perjury in procuring the making of false affidavits to declaratory statements filed in connection with homestead entries by persons who served in the United States Army, in violation of section 37 of the Criminal Code.

A demurrer to the indictment was sustained, the District Court holding that there being no law requiring an oath to be made to declaratory statements filed by soldiers, the false affidavits involved do not constitute perjury; that to procure them is not subornation of perjury, and therefore a conspiracy to procure them is not a conspiracy to suborn perjury.

Notice of this motion has been served on opposing counsel.

JOHN W. DAVIS,
Solicitor General.

NOVEMBER, 1916.

○

In the Supreme Court of the United States.

OCTOBER TERM, 1916.

THE UNITED STATES, PLAINTIFF IN	} No. 685.
ERROR,	
v.	
JESSE T. MOREHEAD.	

*IN ERROR TO THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF MONTANA.*

BRIEF FOR THE UNITED STATES.

STATEMENT.

This writ of error is prosecuted under the Criminal Appeals Act of March 2, 1907, c. 2564 (34 Stat. 1246), to review a judgment of the District Court sustaining a demurrer to an indictment which charged the defendant with conspiracy to commit perjury and subornation of perjury.

The indictment contains two counts, but as they differ only as to the persons with whom the defendant dealt and the places where the transactions occurred, it will suffice to refer to the second count (R. 10). It is there charged in substance that on February 7, 1914, in the State and District of Montana, the de-

fendant conspired and agreed with one Chapman and others to induce persons who had served as soldiers of the United States in the war of the rebellion to make and file, through the defendant as their agent, declaratory statements and affidavits to locate public lands of the United States in the State of Montana under the homestead laws, and in said affidavits to commit perjury by swearing, knowingly contrary to the facts, that the declaratory statements would be made for the exclusive use and benefit of the applicants for the purposes of actual settlement and cultivation of the lands located, and not either directly or indirectly for the use or benefit of any other person, that said agent would have no interest therein, present or prospective, and that the applicants would have made no arrangement or agreement with such agent or any other person for any sale or attempted sale or relinquishment of such locations (R. 11).

It was further charged that the object of the conspiracy was to enable the defendant, as agent for the said applicants, to make applications by means of his own and the applicants' false affidavits to locate certain tracts of public land, and have such applications allowed by the officers in charge of the United States land offices at Havre and Glasgow, Montana, and by the General Land Office, whereby the land so applied for would be withdrawn from entry under the public land laws for a period of six months, during which time it was the purpose of the conspirators to sell and dispose of relinquishments of such locations (R. 11-12).

Overt acts charged in furtherance of the conspiracy are that the said Chapman on February 21, 1914, at Milan, Missouri, induced one Stokes who had served as a soldier of the United States during the war of the rebellion, to execute such false declaratory statement and affidavit and swear to the same before the County Clerk of Sullivan County, Missouri, an officer having a seal and authorized to administer oaths generally, the same being set forth in full in the indictment (R. 13); and that thereafter, in further pursuance of said conspiracy and to effect its object, the defendant Morehead on March 4, 1914, filed in the United States land office at Havre, Montana, the false declaratory statement and affidavit executed by Stokes, together with Morehead's application and false affidavit as agent for Stokes, then and there sworn to before the register of said land office, to locate a particular tract of land therein described, containing 160 acres, in the Havre land district, State of Montana. This application and affidavit is also set out in the indictment (R. 15).

Similar overt acts charged are that Chapman procured one Morrison to execute a similar false declaratory statement and affidavit, which was later filed in the same land office by the defendant, together with a similar application and false affidavit by him as agent to locate a particular tract of land described therein, all of which documents are also set out in full (R. 15-18).

The sworn statements of these applicants are identical in form. After setting forth their qualifications

and appointing the defendant as their attorney in fact to locate for them public lands under the homestead law, they each contain the following (R. 13, 16):

that the location herein authorized is made for my exclusive use and benefit, for the purpose of my actual settlement and cultivation, and not, either directly or indirectly, for the use or benefit of any other person; that my said attorney has no interest, present or prospective, in the premises, and that I have made no arrangement or agreement with him or any other person for any sale or attempted sale or relinquishment of my claim in any manner or for any consideration whatever; and that I have not signed this declaration in blank.

With each declaratory statement the defendant made and filed affidavits in identical form, except as to date and description. That in the case of Stokes was as follows (R. 15):

By virtue of the foregoing, and of a certain power of attorney therein named, duly executed on the 21st day of February, 1914, and filed herewith, I hereby select the NW/4 sec. 35, NE/4 section 34, township 37 north, range 21 east, Montana meridian, as the homestead claim of Robert Stokes, the aforesaid, and do solemnly swear that the same is filed in good faith for the purposes therein specified, and that I have no interest or authority in the matter, present or prospective, beyond the filing of the same as the true and lawful agent of the said Robert Stokes, as provided by section 2309 of the Revised Statutes of the United States.

The defendant interposed a demurrer on the ground that the "indictment does not state facts sufficient to constitute an offense against the laws of the United States" (R. 18). The court sustained this demurrer and filed the following memorandum opinion (R. 19):

There is no law, directly or by implication, requiring affidavits to soldiers' declaratory statements. The Land Department is not authorized to exact them. Consequently, no law "authorizes an oath to be administered" for such affidavits. As only when an oath is authorized to be administered is perjury possible, it follows the false affidavits herein do not constitute perjury.

Since not perjury, to procure them is not subornation of perjury, and an agreement to procure them is not a conspiracy to suborn perjury. Hence, the indictment charges no offense.

ASSIGNMENTS OF ERROR.

(R. 20.)

First. The court erred in sustaining the defendant's demurrer to the indictment.

Second. The court erred in holding that the indictment does not state facts sufficient to constitute an offense against the laws of the United States.

Third. The court erred in holding that section 2309, Revised Statutes of the United States, does not require homestead declaratory statements, filed under and in accordance with the provisions of said section, to be made under oath.

Fourth. The court erred in holding that there is no law requiring homestead declaratory statements, filed under and in accordance with the provisions of section 2309, Revised Statutes of the United States, to be made under oath.

Fifth. The court erred in holding that there is no law authorizing the Land Department of the United States to require declaratory statements, filed under and in accordance with the provisions of section 2309, Revised Statutes of the United States, to be made under oath.

Sixth. The court erred in holding that an agreement to procure the making under oath and filing of homestead declaratory statements under and in accordance with the provisions of section 2309, Revised Statutes of the United States, is not a conspiracy to suborn perjury.

These assignments of error present but a single question, namely, whether the affidavits which the defendant and his co-conspirator agreed to make and procure to be made were authorized by any law of the United States. The consideration of this question brings into view certain provisions of the Penal Code, the Public Land Law, and the Departmental Regulations.

THE PENAL CODE.

The indictment is founded upon section 37 of the Penal Code, which provides:

If two or more persons conspire * * * to commit any offense against the United States, * * * and one or more of such parties do any act to effect the object of the

conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars, or imprisoned not more than two years, or both.

Perjury is defined by section 125 in the following language:

Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, * * * shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than two thousand dollars and imprisoned not more than five years.

And subornation of perjury is defined as follows by section 126:

Whoever shall procure another to commit any perjury is guilty of subornation of perjury, and punishable as in the preceding section prescribed.

THE PUBLIC LAND LAW.

Section 2290 of the Revised Statutes, as amended by the act of March 3, 1891 (26 Stat. 1095, 1098), requires every person "applying to enter" land as a homestead to make an affidavit stating, among other things—

That such application is honestly and in good faith made for the purpose of actual settlement and cultivation, and not for the benefit of any other person.

Section 2304 of the Revised Statutes gives to every soldier who served in the army of the United States for ninety days during the war of the rebellion, who was honorably discharged and has remained loyal to the Government, "on compliance with the provisions of this chapter [ch. 5, including section 2290], as hereinafter modified," the right to enter 160 acres of public land as a homestead and receive a patent therefor, and provides that he—

shall be allowed six months after locating his homestead, and filing his declaratory statement, within which to make his entry and commence his settlement and improvement.

Section 2305 allows to such entryman a deduction of the time of his military service from the time required to perfect title under the homestead law, but provides that—

no patent shall issue to any homestead settler who has not resided upon, improved, and cultivated his homestead for a period of at least one year after he shall have commenced his improvements.

No change is made in this language of sections 2304 and 2305 by the amendatory act of March 1, 1901 (31 Stat. 847).

Section 2309 provides that every person coming within the provisions of section 2304 may—

as well by an agent as in person, enter upon such homestead by filing a declaratory statement, as in pre-emption cases; but such claimant in person shall within the time prescribed

make his actual entry, commence settlements and improvements on the same, and thereafter fulfill all the requirements of law.

Section 2246 provides:

The register or receiver is authorized, and it shall be their duty, to administer any oath required by law or the instructions of the General Land Office, in connection with the entry or purchase of any tract of the public lands.

THE DEPARTMENTAL REGULATIONS.

Section 161 of the Revised Statutes reads as follows:

The head of each Department is authorized to prescribe regulations, not inconsistent with law, for the government of his Department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it.

By section 441:

The Secretary of the Interior is charged with the supervision of public business relating to the following subjects: * * * The public lands, * * * .

Section 453 provides that—

The Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, * * * .

Section 2478 specifically grants authority to make regulations for enforcement and execution of the public land laws in the following language:

The Commissioner of the General Land Office, under the direction of the Secretary of the Interior, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this Title [Title xxxii—The Public Lands] not otherwise specially provided for.

Pursuant to this authority the Commissioner, with the approval of the Secretary, on October 11, 1910, promulgated regulations to govern the making and filing of soldiers' declaratory statements, which are in part as follows (39 L. D., 291, 294-295):

The soldier's declaratory statement, if filed in person, must be accompanied by the prescribed evidence of military service and the oath of the person filing the same, stating his residence and post-office address, and setting forth that the claim is made for his exclusive use and benefit for the purpose of actual settlement and cultivation, and not, either directly or indirectly, for the use or benefit of any other person; * * *

In case of filing a soldier's declaratory statement by agent, the oath must further declare the name and authority of the agent and the date of the power of attorney, or other instrument creating the agency, adding that the name of the agent was inserted therein before its execution. It should also state in terms that the agent has no right or interest, direct

or indirect, in the filing of such declaratory statement.

The agent must file (in addition to his power of attorney) his own oath to the effect that he has no interest, either present or prospective, direct or indirect, in the claim; that the same is filed for the sole benefit of the soldier, and that no arrangement has been made whereby said agent has been empowered at any future time to sell or relinquish such claim, either as agent or by filing an original relinquishment of the claimant.

Where a soldier's declaratory statement is filed in person, the affidavit of the soldier or sailor must be sworn to before either the register or the receiver, or before a United States commissioner, or a United States court commissioner, or judge, or clerk of a court of record in the county or land district in which the land sought is situated. Where a declaratory statement is filed by an agent, the agent's affidavit must be executed before one of the officers above mentioned, but the soldier's affidavit may be executed before any officer having a seal and authorized to administer oaths generally, and not necessarily within the land district in which the land is situated.

Of these regulations the courts of the United States take judicial notice. *Caha v. United States*, 152 U. S. 211, 221-222, and cases cited.

ARGUMENT.

The duty to execute the public land laws is committed to the officers of the Land Department (R. S. §§ 441, 453). To enable them to discharge this duty they are authorized to make appropriate regulations not inconsistent with law (§§ 2478, 161). This grant of administrative authority to make regulations in aid of the law is not an unconstitutional delegation of legislative powers. *United States v. Grimaud*, 220 U. S. 506, 516-520, and cases cited.

The homestead laws require every location by declaratory statement to be made honestly and in good faith, for the purpose of actual settlement and cultivation by the applicant, and not for the benefit of any other person (§ 2290, amended 26 Stat. 1098; § 2304, amended 31 Stat. 847; § 2309). This is an essential condition of the right which the Land Department is bound to enforce, and which it is authorized to enforce by appropriate regulation. It could not be enforced without ascertainment of the fact, and as the law is silent as to the mode of proof, the requirement that the applicant make oath to it is consistent with the law and appropriate to the law's enforcement.

In the case of a location by an agent (§ 2309), the opportunity for evasion of this essential condition of the soldier's right is so inviting that the requirement of an affidavit from both the soldier and his agent of the agent's lack of interest in the location is equally consistent and appropriate.

Departmental regulations thus suitably addressed to the execution of the law and authorized by the law have all the force of the law itself. The case is precisely the same as if the affidavits so required had been expressly and directly authorized by a statute of the United States. *United States v. Bailey*, 9 Pet. 238, 254-255; *Caha v. United States*, 152 U. S. 211, 217-220; *United States v. Smull*, 236 U. S. 405, 408-412.

The register of the local land office, before whom the defendant made the affidavits as agent of the applicants, had express statutory authority to administer the required oaths. R. S. § 2246. And the State officers, who took the soldiers' affidavits, being authorized to administer oaths generally and having official seals, had ample authority in these instances by virtue of the departmental regulation made pursuant to and in execution of the law. *United States v. Bailey*, 9 Pet. 238, 253; *Caha v. United States*, 152 U. S. 211, 218-219.

The affidavits in question having been authorized by law, and the oaths having been administered by competent officers, the false affidavits of the defendant and the applicants were perjury (Penal Code, § 125; citations, *supra*), the procuring of the false affidavits from the applicants by the defendant's co-conspirator was subornation of perjury (§ 126), and their agreement to make and procure the making of such affidavits, followed by these overt acts, was a conspiracy to commit those offenses. § 37; *Wil-*

liamson v. United States, 207 U. S. 425, 449; *United States v. Rabinowich*, 238 U. S. 78, 85-86.

The Criminal Appeals Act (March 2, 1907, c. 2564, 34 Stat. 1246), under which this writ of error is prosecuted, limits the jurisdiction of this court to a review of the single point decided by the District Court as to whether there is any law of the United States authorizing the affidavits in question to be taken (R. 19). Other points raised by the demurrer (R. 18) as to the sufficiency of the indictment upon general principles of criminal law can not be considered. *United States v. Keitel*, 211 U. S. 370, 397-399; *United States v. Stevenson*, 215 U. S. 190, 195.

CONCLUSION.

The judgment of the District Court should be reversed.

Respectfully submitted.

FRANCIS J. KEARFUL,
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S. W. WILLIAMS,
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FEBRUARY, 1917.

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Office Supreme Court, U. S.

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JAMES D. MAHER

CLERK

Supreme Court of the United States

No. 685.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

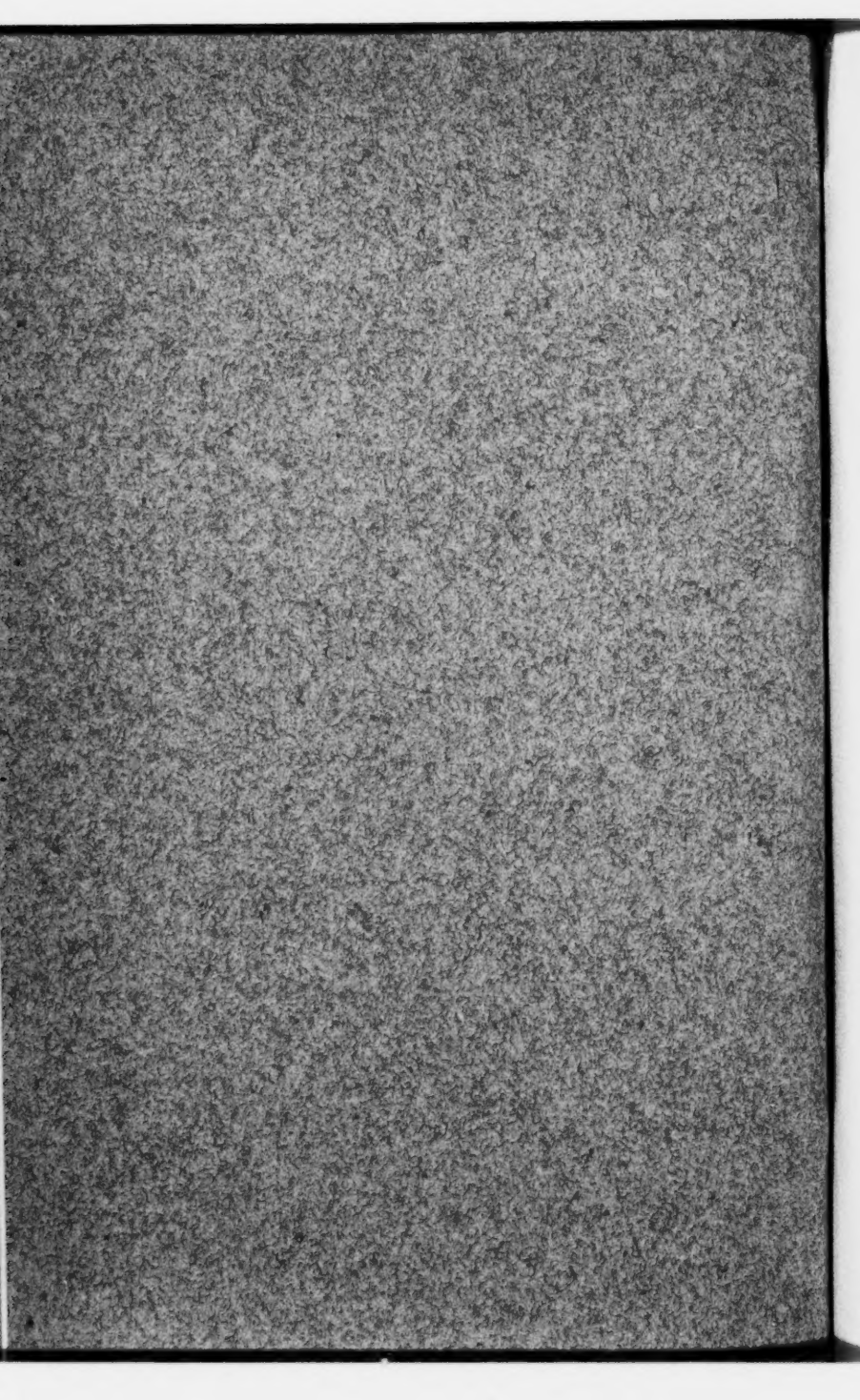
JESSE T. MOREHEAD.

BRIEF OF DEFENDANT.

W. B. SANDS,

Chinook, Montana,

Attorney for Defendant.



Supreme Court of the United States.

No. 685.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

JESSE T. MOREHEAD.

BRIEF OF DEFENDANT.

The indictment in this case charges the crime of subordination of perjury by procuring an alleged co-conspirator to make oath to a Soldier's Declaratory Statement preliminary to filing upon a tract of public land.

The Hon. Judge Bourquin, who sustained the indictment, attached a memorandum to his decision sustaining the demurrer, stating therein that the demurrer was sustained upon the ground that there is no authority of law requiring a Soldier's Declaratory Statement to be made under oath.

The defendant contends that the demurrer should be sustained upon two grounds. (1) That the Soldier's Declaratory Statement is not an oath "in any case in which a law of the United States authorizes an oath to be administered," and therefore can not constitute perjury, and (2) That the officers, a notary public and county clerk, in this case or in either of them were not "a competent tribunal, officer or person authorized to administer oaths in matters pertaining to the administration of the public land laws."

The law authorizing soldiers to make homesteads and declaratory statements was approved on June, 1872, and the two sections directly pertaining to the issues in this case are under the Revised Statutes, numbered Sections 2304 and 2309, as follows:

Section 2304:

"Every private soldier . . . who has served in the war . . . shall be entitled to enter upon and receive patents for quantities of public lands not exceeding one hundred and sixty acres . . . subject to entry under the homestead laws of the United States; but such homestead settler shall be allowed six months after locating his homestead and filing his declaratory statement to make his entry and commence his settlement, and improvements."

Section 2309:

"Every soldier, sailor, marine, officer, or other person coming within the provisions of section twenty-three hundred and four, may, as well by an agent as in person, enter upon such homestead by filing a *declaratory statement*, as in *preemption cases*; but such claimant in person shall within the time prescribed make his actual entry, commence settlements and improvements on the same, and thereafter fulfill all the requirements of law."

It therefore becomes important to determine accurately the meaning of the word "declaratory statement," and since we are referred to the declaratory statement in preemption cases, we now refer to Sections 2257 to 2275 inclusive, but the sections particularly applicable are as follows:

Section 2259:

"Every person, being the head of a family, or widow, or single person, over the age of twenty-one years, and a citizen of the United States, or

having filed a declaration of intention to become such, as required by the naturalization laws, who has made, or hereafter makes, a settlement in person on the public lands subject to preemption, and who inhabits and improves the same, and who has erected or shall erect a dwelling thereon, is authorized to enter with the register of the land office for the district in which such land lies, by legal subdivisions, any number of acres not exceeding one hundred and sixty, or a quarter section of land, to include the residence of such claimant, upon paying to the United States the minimum price of such land."

Section 2262:

"Before any person claiming the benefit of this chapter is allowed to *enter* lands, *he shall make oath before the receiver or register of the land district* in which the land is situated that he has never had the benefit of any right of preemption under section twenty-two hundred and fifty-nine; that he is not the owner of three hundred and twenty acres of land in any State or Territory; that he has not settled upon and improved such land to sell the same on speculation, but in good faith to appropriate it to his own exclusive use; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person whatsoever, by which the title which he might acquire from the Government of the United States should inure in whole or in part to the benefit of any person except himself; and if any person taking such oath swears falsely in the premises, he shall forfeit the money which he may have paid for such land, and all right and title to the same; and any grant or conveyance which he may have made, except in the hands of bona-fide purchasers, for a valuable consideration, shall be null and void, except as provided in section twenty-two hundred and eighty-eight. And it shall be the duty of the officer administering such oath to file a certificate thereof in the

public land office of such district, and to transmit a duplicate copy to the General Land Office, either of which shall be good and sufficient evidence that such oath was administered according to law."

Section 2263:

"Prior to any entires being made under and by virtue of the provisions of section twenty-two hundred and fifty-nine, proof of the settlement and improvement thereby required shall be made to the satisfaction of the register and receiver of the land district in which such lands lie, agreeably to such rules as may be prescribed by the Secretary of the Interior; and all assignments and transfers of the right hereby secured, prior to the issuing of the patent, shall be null and void."

Section 2264:

"When any person settles or improves a tract of land subject at the time of settlement to private entry, and intends to purchase the same under the preceding provisions of this chapter, he shall within thirty days after the date of such settlement, file with the register of the proper district a *written statement*, describing the land settled upon and *declaring his intention* to claim the same under the preemption laws; and he shall, moreover, within twelve months after the date of such settlement, make the proof, affidavit, and payment hereinbefore required. If he fails to file such *written statement*, or to make such a *ffidavit, proof, and payment* within the several periods named above, the tract of land so settled and improved shall be subject to the entry of any other purchaser."

Section 2265:

"Every claimant under the preemption law for land not yet proclaimed for sale is required to *make known his claim in writing* to the register

of the proper land office within three months from the time of the settlement, giving the designation of the tract and the time of settlement; otherwise his claim shall be forfeited and the tract awarded to the next settler, in the order of time, on the same tract of lands, who has given *such notice* and otherwise complied with the conditions of the law."

Section 2266:

"In regard to settlements which are authorized upon unsurveyed lands, the preemption claimant shall be in all cases required to file his *declaratory statement* within three months from the date of the receipt at the district land office of the approved plat of the township embracing such preemption settlement."

Section 2272:

"Nothing in the provisions of this chapter shall be construed to preclude any person, who may have filed a *notice of intention to claim* any tract of land by preemption, from the right allowed by law to others to purchase such tract by private entry after the expiration of the right of preemption."

Particular attention is called to the distinction between the "entry" and the "notice of intention" or a declaratory statement, as the latter two terms are here used synonymously.

Section 2259 distinctly specifies that the payment shall be made at the time of *entry*. There are not two entries. The first is a *mere notice* filed in the land office indicating the land theretofore settled upon by claimant in preemption cases. It was of no effect unless previous settlement had been made upon the land and served only to give a preference right of entry for a limited time. Section 2262 defines the officer before whom the final

proof may be taken and specifically therein defines perjury as being a false statement made in connection with the *entry*. There is not in that section, or any other section of the preemption law, any suggestion that a false statement made in a declaratory statement would constitute perjury.

The Land Office in its decisions and regulations makes a clear distinction between a declaratory statement and an entry. An entry segregates the land while a declaratory statement merely suspends the allowance of other entries upon the same land and does not segregate the land.

Congress probably had in mind in granting to the soldier the right to reserve the land through an agent, a right not enjoyed by other citizens, the inconvenience of going to the Land Office and appearing before the register to make this affidavit. There was no law authorizing any other officer at that time to take an oath in respect to land matters and the loss which might arise to another intending entryman during the six months preference right period was so small and the improbability of the soldier exhausting his right for the mere privilege of suspending the land from entry for six months so great that Congress did not deem it necessary to require an oath in this case. The Soldier's Declaratory Statement did not give a right of occupation. If the Land Office, by a regulation, attempted to require an affidavit as a declaratory statement it exceeded its jurisdiction and greatly lessened to the soldier the value of the right granted to him by Congress. An almost exactly similar situation arose with respect to certain rights to locate land under the act of February 11, 1847, was referred to the Attorney-General for an opinion and in Vol. 5 of the Attorney-General's opinion, page 609, the Hon. J. J. Crittenden very emphatically expressed his disapproval of the effort of the Land Office

to require affidavits of soldier's who were about to select land under this act. He therein suggested the impropriety of requiring soldiers to make long journeys to the Land Office as a condition precedent to the enjoyment of a right granted by Congress without such condition.

Congress by authorizing the soldiers to file, by agent, by necessary implication relieved the soldier from making personal visit to the Land Office, and as the only officer then qualified to take affidavits in land cases was the register, this right was and is of considerable consequence. The number of officers before whom an affidavit may be taken in land matters has since been increased, but there is no present law authorizing an affidavit pertaining to public lands to be taken outside the land district. The regulations assume to permit the taking of this affidavit before any officer authorized to administer oaths, but this part of the regulation is clearly without authority as will appear later and is the only instance in the regulations of the Land Office where an affidavit is authorized to be taken outside the district.

It seems so clear from the statute itself that a Soldier's Declaratory Statement was not intended to be made under oath that the citation of court decisions are a mere waste of time.

The case of the United States *vs.* Smull, 236 U. S., 45, 408-412, cited by the Counsel for the United States, is the most pertinent and the strongest case against this defendant, but the reasoning of Judge Hughes in that case clearly holds the contention of defendant in this case. In that case Congress authorized the Land Department to make inquiry under oath under the circumstances, whereas in this case Congress granted a right without imposing a burdensome condition.

Directly in point if authorities are required is the case of United States *vs.* Eaton, Vol. 12, U. S. Rep., page 764, which involved regulations made by the

Commissioner of the Internal Revenue in making effective the Oleomargarine Law. In that case two paragraphs of the opinion of the court are as follows:

"It was said by this court in *Morrill vs. Jones*, 106 U. S., 466, 467, 1 Sup. Ct. Rep., 423, that the Secretary of the Treasury can not by his regulations alter or amend a revenue law, and that all he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted. Accordingly, it was held in that case, under Section 2505 of the Revised Statutes, which provided that live animals specially imported for breeding purposes from beyond the seas should be admitted free of duty, upon proof thereof satisfactory to the Secretary of the Treasury and under such regulations as he might prescribe, that he had no authority to prescribe a regulation requiring that, before admitting the animals free, the collector should be satisfied that they were of superior stock, *adapted to improving the breed in the United States*.

"Much more does this principle apply to a case where it is sought substantially to prescribe a criminal offense by the regulation of a department. It is a principle of criminal law that an offense which may be the subject of criminal procedure is an act committed or omitted in violation of a public law, either forbidding or commanding it. 4 Amer. & Eng. Enc. Law, 642; 4 Bl. Comm., 5."

THE JURISDICTION OF THE OFFICERS.

The affidavit in the first count of the indictment was taken by a notary public and in the second count by a county clerk. Section 2294 of the Revised Statutes clearly defines what officers may take affidavits in land matters and reads as follows:

"That hereafter all affidavits, proofs and oaths of any kind whatsoever required to be made by applicants and entrymen under the homestead pre-emption, timber culture, desert land and timber

and stone acts, may, in addition to those now authorized to take such affidavits, proofs and oaths be made before any United States Commissioner or commissioner of the court exercising federal jurisdiction in the territory or before the judge or clerk of any court of record in the land district in which the lands are situated. . . .

The proof, affidavit and oath when so made and duly subscribed shall have the same force and effect as if made for the register and receiver when transmitted to them with the fees and commissions allowed as required by law. That if any witness making such proof or any applicant making such affidavit or oath shall knowingly willfully or corruptly swear falsely to any material matter contained in said proof, affidavits or oaths, he shall be deemed guilty of perjury and shall be liable to the same pains and penalties as if he had sworn falsely before the register."

This is the law now in effect and seems to very clearly specify what officers are authorized to take affidavits in land matters. The Land Office by its regulations and instructions recognizes this section of the statute in every case except the making of Soldier's Declaratory Statements. Probably the Land Office itself recognized the injustice and impropriety of requiring the old soldiers to make long trips to the land district to make an affidavit which manifestly was quite inconsistent with the right, granted by Congress to file by agent.

The case of the United States *vs.* Bailey, 9 Peters, 238, is cited in the brief of the plaintiff in error. That case held that a justice of the peace has authority to take an oath required by the Treasury Department in matters pertaining to disbursements of monies by that department. Congress has nowhere made any provision for such affidavits or designated any officers for taking same, and under such circumstances the court held in that case that the justice of the peace would have under

the general authority the jurisdiction to take the affidavit.

In this case the condition is quite different. Here Congress has specified the officers authorized to take affidavits in land matters and by necessary implication excluded all others. Further authorities upon this point are unnecessary.

In conclusion, therefore, the defendant insists that the affidavit which is a basis for this charge was not one required by the law, and that the officers before whom the affidavits were taken were without jurisdiction to take these particular affidavits and upon either ground the decision of the lower court should be sustained.

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